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Supreme Court of the United States.

OCTOBER TERM, 1928.

No. 15.

BOSTON SAND & GRAVEL COMPANY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

SUPPLEMENTAL BRIEF FOR THE PETITIONER ON REARGUMENT.

JOHN W. DAVIS,
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Counsel for Petitioner.

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Supreme Court of the United States

OCTOBER TERM, 1928.

BOSTON SAND & GRAVEL COMPANY, Petitioner, v. UNITED STATES OF AMERICA, Respondent.	No. 15.

SUPPLEMENTAL BRIEF FOR THE PETITIONER ON REARGUMENT.

The petioner in the present case, of course, recognizes that no action to recover for governmental torts can be maintained against the Government without its consent and also that recovery can in no case be broader than the consent given. Congress may unquestionably authorize a tort claimant to recover a part only of the damages that would be due in like cases between private persons. Petitioner recognizes this and, consequently, that if the consent in the present case does not extend to the award of interest, interest cannot be recovered.

The petitioner's case rests upon the proposition that governmental consent to the award of interest in the present case has been given.

The authorities that the petitioner relied upon in its main brief establish that such consent may be given, either by providing for the award of interest *eo nomine* or by providing for its award in a proper case in more generic terms, as by the name of damages or by reference to principles of liability from which it follows that interest must have been intended to be allowed. It may also be given by the Government's sub-

mitting itself to the general jurisdiction of a court for the purpose of having the whole controversy determined. These are all recognized to be modes of governmental consent. In the present case, the statute does not name "interest" specifically; but the statute does provide for the assessment of "damages" against the Government; it does refer to principles of liability from which it follows that interest was intended to be allowed (*Hicks* v. *Guinness*, 269 U. S. 71, 81); and it does contain a general submission of the whole controversy to an admiralty court for determination.

In its original brief, the petitioner advanced the contention that an enabling act providing for the assessment of "damages" against the Government is sufficient to give to a claimant interest against the Government whenever, in like circumstances between private persons, interest would be allowed as part of the damages to be awarded.

In support of this proposition, the petitioner cited the statement of this court in *United States ex rel. Angarica* v. *Bayard*, 127 U. S. 251, 260:

> "It has been established, as a general rule in the practice of the Government, that interest is not allowed on claims against it [the Government], whether such claims originate in contract or in tort, and whether they arise in the ordinary business of administration or under private acts of relief, passed by Congress on special application. The only recognized exceptions are where the Government stipulates to pay interest and where interest is given expressly by an Act of Congress, *either by the name of interest or by that of damages*." (Italics ours.)

It seems to the petitioner clear beyond controversy that this court intended to say in the above quoted passage that a statute consenting to the assessment of "damages" against the Government may sometimes be a sufficient generic consent to the award of "interest". It seems equally clear that the court did not intend to say that every such statute would give a right to interest and the petitioner has advanced no such contention.

The word "damages" is a juridical term and for its meaning it is of course necessary to turn to the decided cases. In its original brief, the petitioner demonstrated that under the well-settled judicial usage of the term "damages", interest is to be described as "damages" whenever it is given independently of stipulation for it between the parties.

The petitioner therefore suggested that whenever an enabling act provides for the assessment of damages against the Government the inquiry must be whether, independently of stipulation by the parties, interest would be awarded in a like case between private persons. In this suggestion the petitioner followed the example of Attorney General Cushing, whose opinion of September 20, 1855, 7 Op. A. G. 523, 530-531, cited by this court in the *Angarica* case, was undoubtedly the source of the statement from that case already quoted.

The Government in its brief overlooks that the subject-matter of this statute and of this suit is a maritime collision. The remarks contained in the Government's brief as to what might or might not be considered damages in other cases arising at common law, therefore, have no application. As early as the case of *The Santa Maria*, 10 Wheat. 431, this court recognized that interest given in cases of maritime tort is an element of damages. In that case, Mr. Justice Story took occasion to say:

> "The same doctrine applies to the claim of interest made by the libellant. The question was involved in the original proceedings, and the libel itself contains an express prayer for damages, as well as for restitution of the property. Damages are often given by way of interest, for the illegal seizure and detention of property; and, indeed, in cases of tort, if given at all, interest partakes of the very nature of damages."

Later, in *The Wanata*, 5 Otto. (95 U. S.) 600, at pages 613, 614, this Court expanded the doctrine as follows:

> "Interest in such a case is allowed as well as costs; and in case of appeal, the interest is cast upon the whole

amount of the decree in the court below, including the costs as well as the amount of the damage. *The Dundee*, 2 Hagg. 137.

"Due objection to a decree settled in that form was made in that case; but Lord Stowell held that the allowances were correct, that the costs to which the party is put to recover his just damages is a part of his loss, and that the costs in such a case are properly added to the damages in the computation of interest. Objection was also made in that case to the allowance of interest, as the damages were equal to the value of the ship; but the same learned judge answered that the sufferer is entitled to such costs as he shall incur in recovering the value of the ship, and to interest if payment is delayed, meaning, of course, that the party causing the delay is liable in such a case; and he added, that the suffering party is entitled to remuneration for the costs to which he is driven for recovering his loss, as the costs constitute a part of the same; that the act of Parliament is not guilty of the injustice which would ensue if it excluded the costs, which are necessary for replacing the sufferer in a just state of compensation. Such a party if he is reinstated in the value of the property without litigation, is not entitled to costs; but if he cannot obtain the benefit of the regulation in respect to compensation without being driven to the necessity of a suit, the statute would be chargeable with great injustice if it did not allow him to recover costs; and these remarks apply with equal force to the charge of intervening interest arising from delay occasioned by such litigation."

This view of interest is carried into the rules of this court —see subsection 4 of General Rule 30 of this court and is fully in accord with the decision of this court in *The John Twohy*, 255 U. S. 277, where this court held that an appeal in admiralty, unlike an appeal at common law, is a new trial.

From these authorities it is clear that in so far as an admiralty case is concerned, interest has always been considered not as an item distinct from the damages, but as an item which must be included in the damages allowed in order to compensate the sufferer for his loss.

The same view of interest as an item of damages has been taken by this court in admiralty cases where the Government was a party.

The Thekla, 266 U. S. 328;
The Nuestra Senora de Regla, 108 U. S. 92;
The Paquete Habana, 189 U. S. 453.

In *The Nuestra Senora de Regla*, a case arising out of the wrongful seizure by the United States authorities in 1861 of the vessel there concerned, "the cause was referred to one of the commissioners of the court to ascertain the amount of the *damages* the claimant had sustained by the seizure and detention of the vessel" (p. 97). Interest was allowed amongst other items of damages. On appeal the award was affirmed, this court saying (p. 102):

> "Under these circumstances, we cannot but think that the United States have voluntarily submitted themselves to the Court at the instance of the Spanish Government, and with the consent of the claimant *for the purposes of having the questions of damages growing out of the capture judicially settled according to the rules applicable to private citizens in like cases.*" (Italics ours).

In *The Paquete Habana*, a similar case, such "damages" were to be assessed "as to justice may appetrain and as the legal responsibility therefor may appear" (p. 464). Interest was allowed as an element of "compensatory damages". This court on appeal re affirmed its position in *The Nuestra Senora de Regla*, saying (p. 466):

> "In the Nuestra Senora de Regla, 108 U. S. 92, at 102, the Court was of opinion that the United States had submitted to the jurisdiction of the Court so far as to warrant the ascertainment of *damages according to the rules applicable to private persons in like cases.*" (Italics ours).

In *The Thekla*, a collision libel, in which the United States voluntarily filed a claim "'without submitting itself

to the jurisdiction' of the court" (p. 338), this court approved an award of damages against the Government that included interest. At page 341 of the opinion it was said:

> "As has been said in other cases the question of damages to the colliding vessel necessarily arose and it is reasonable for the Court to proceed to the determination of all the questions legitimately involved, even when it results in a judgment for damages against the United States. *The Nuestra Senora de Regla*, 108 U. S. 92. *The Paquete Habana*, 189 U. S. 453, 465, 466. We gather that our conclusion accords with the opinion of the English Courts. *The Newbattle*, 10 P. D. 33. *The Teresita*, (1922) P. 259, 272. It is said that there is no statute by which the Government accepted this liability. It joined in the suit and that carried with it the acceptance of whatever liability the courts may decide to be reasonably incident to that act.
>
> "It follows from what has been said, without the need of going further, that the stipulation ordered before the United States made itself a party, is valid, and that interest and costs can be recovered from the Fleet Corporation. See *Sloan Shipyards Corporation* v. *United States Shipping Board Emergency Fleet Corporation*, 258 U. S. 549. Interest was allowed against the United States in *The Nuestra Senora de Regla* and *The Paquete Habana*, *supra*, and interest and costs by the judgment affirmed in *Porto Rico* v. *Ramos*, 232 U. S. 627."

In all of these cases this court held that because the Government had submitted generally to the jurisdiction of the court, interest was to be allowed as an item of the damages. It is obvious that to decline to allow it would be unjust and a disallowance of full compensation to which the sufferer was entitled.

It is noteworthy that in the *Thekla*, as in the present case, the controversy arose out of a collision. The only difference between the two cases is that in *The Thekla*, the Government voluntarily entered the proceedings, whereas here the proceedings were instituted under the terms of a statute authorizing such proceedings. During the course of the first argument in the present case, we understood Mr. Justice

Brandeis to ask counsel for the Government whether in a suit by the Government, interest was allowed on counter-claims. Counsel for the Government replied in the negative, citing *United States* vs. *North American Company*, 253 U. S. 330. Counsel for the Government overlooked the fact that the present case differed materially from the *North American* case, and that this court had decided in a unanimous opinion in *The Thekla*, that in a maritime collision case such as this interest be allowed on counterclaims. *The Thekla, supra.* This is true because of the different rule which applies in admiralty. And in a collision case there can be no doubt, for as was said in *The Thekla:*

> "A collision involves two vessels. The trial of such cases in the ordinary course is upon libel and cross libel, consolidated under authority of statute. Rev. Stats. §921. *The North Star*, 106 U. S. 17. If both parties were in fault the entire damage would be divided equally between them, and it could not be argued that the United States could avoid the consequences of the rule although the damage to the other vessel might bar its recovering anything. This shows that the subject-matter is the collision, rather than the vessel first libelled. *Boucker* v. *United States*, 186 U. S. 135, 139. The libel in such a case is like a bill for an account, which imports an offer to pay the balance if it should turn out against the party bringing the bill."

The meaning which counsel for the Government has sought to give to the word "damages" and the authorities which he has cited in support of his argument, is beside the issue. Nor does this case require a decision that in all tort cases, whether at common law or in admiralty, interest must be awarded as an item of damages. It may be noted in passing that even at common law, in certain cases, interest is allowed as damages even against the Government. *Porto Rico* v. *Ramos*, 232 U. S. 627 (*cf.* statement of Holmes, J. in *The Thekla*, 266 U. S. 328, 341); *Ex parte The Republic of Colombia*, 195 U. S. 604. In the *Colombia* case, it was said (p. 606) that

> "• • • When the Republic submitted itself to the courts, it must be taken to have done so on the same terms as other litigants, so far as fixing the amount which it was to pay was concerned; that being the matter on which the action of the courts was invoked, it seems to us that it was competent for the Circuit Court to decree the payment of interest as in an ordinary case."

United States v. *North American Company*, 253 U. S. 330, does not conflict with the implications of these cases; neither does *United States* v. *Sherman*, 98 U. S. 565, nor *United States* v. *North Carolina*, 136 U. S. 211,—cases cited in the course of the *North American* opinion. For in all three of these cases the actions were in theory contractual and in none was the defendant government generally before the court as it was in the other cases that have been discussed. Not even in the *North American* case; for the jurisdiction of the Court of Claims, from which the case came, is limited to contract actions, express or implied, and so, its power to assess damages, to damages appropriate to that form of action. Neither was the claimant in any of these cases proceeding under a statute calling for the assessment of "damages" against the Government.

It was urged upon the court in the *North American* case that the interest sought was not sought as interest, *i. e.*, as damages for detention of payment of a sum due; but as damages, conventionally measured, for the use and occupation of the claimant's land by the Government prior to the passage to the Government of title thereto. It was urged that the action, though in form contractual as for money promised to be paid to the claimant on the date of the wrongful taking of his land, was in fact delictual and so required the giving of just compensation for the wrong done, such just compensation, under well-settled principles, comprehending interest for the period above mentioned. But the court held that the theory, upon which the jurisdiction of the Court of Claims alone depended, would have to be consistently maintained, fictitious though it might be. The court said (p. 337):

> "It is an action of contract to recover money which the United States is assumed to have promised to pay; and the assumed promise was to pay the value at the time of the taking. The suit is in effect an action on two counts—one for the value of the mining claim, the other for use and occupation after December 8, 1900, at the rate of $7500 a year. • • • But as • • • the loss of the use of the money [the value of the mining claim at the time of the taking] results from the failure to collect sooner a claim held to have accrued when the company's property was taken, that which the company seeks to recover is, in substance, interest, and that Congress has denied to the Court of Claims the power to allow."

All other reasons apart, the statute (section 177 of the Judicial Code) made the result in the *North American* case inevitable since it specifically forbade allowance of unstipulated interest by the Court of Claims.

It is true the court in the course of its opinion did say (p. 336) that the result accorded with the "common-law rule",

> "that delay or default in payment (upon which, in the absence of express agreement, the right to recover interest rests), can not be attributed to the sovereign";

but obviously that rule is applicable only where interest is given for "delay or default in payment"—the only type of case, of course, to which the jurisdiction of the Court of Claims in theory extended. It is, of course, conceivable that this rule might forbid the recovery of interest against the Government at law even in a tort case, since the orthodox theory of the law courts is that upon breach of any legal duty there arises *eo instanti* a new secondary, or remedial, right to be paid damages (*cf. Die Deutsche Bank* v. *Humphrey*, 272 U. S. 517), and under that orthodox theory, the right to interest arises only upon a secondary wrong, which, as pointed out in the *North American* case, consists in "delay or default in payment" of this secondary, or remedial, claim. But bearing against any such conclusion there stands what was done in the *Ramos* case.

Be the rule at law what it may, however, it is at least clear that this theory of the law courts is not that upon which recovery is allowed for a maritime collision. The right of the libellant in such cases is to *restitutio in integrum*—a right to a full and complete indemnity. The aim of the admiralty court is by its decree to put the owner of a lost vessel into as good a position pecuniarily as he would have occupied, had the collision not occurred. Thus in the leading treatise on the subject—*Roscoe on Damages in Marine Collisions*—it is stated at page 5:

> "The object of the award of damages arising out of a collision is to place the owner of the lost or injured ship as nearly as may be in the same pecuniary position as he would have been in but for the collision. In a series of judgments in the Admiralty Court, (*The Woodrup Sims*, (1815) 2 Dods. 83, 85; *The Dundee*, (1882) 1 Hagg. 121; *The Clyde*, (1886) Swab. 23; *The Hebe*, (1847) 2 W. Rob. 530) this principle has been called *restitutio in integrum*—the 'right to a full and complete indemnity'—and this is therefore the measure and standard of damages which are recoverable by the owner of a ship which has been injured in a collision by a wrongful act on the part of another person."

The difference between law and admiralty courts as to the theory of recovery is so marked that in England where, in the absence of statute, as is well known, interest as damages is scarcely recoverable at all in the law courts, the admiralty courts, nevertheless, allow interest to collision libellants as a matter of course as a part of their damages. (*Cf.* the excerpt from the opinion of Sir Charles Butt in *The Kong Magnus*, (1891) Prob. Div. 223, quoted pp. 9-10, of the petitioner's main brief.)

This difference in theory of recovery in admiralty and at law is also well illustrated by *The Gertrude*, 6 Aspinall's Maritime Cases, N. S., 315. That case, after trial on the merits at law, was transferred to admiralty for the assessment of damages. Although interest would not have been recoverable at law, the consent to transfer was held to con-

stitute a consent to the application of admiralty principles and interest was accordingly awarded.

The admiralty view is the same in the United States as in England. In *The Baltimore*, 8 Wall. 377, Mr. Justice Clifford said (p. 385).

> "*Restitutio in integrum* is the leading maxim in such cases."

As early as 1824 in *The Apollon*, 9 Wheat. 362, Mr. Justice Story held that

> "• • • where the vessel and cargo are lost or destroyed, the measure has been deemed to be the actual value, together with interest upon the amount from the time of the trespass. Where there has been a partial injury only, the loss being ascertained, a similar rule has been applied."

The rule in admiralty was noted in *Frazer* v. *Bigelow Carpet Company*, 141 Mass. 126, by Mr. Justice Holmes, then a member of the Massachusetts court:

> "Interest is allowed in the admiralty upon damages for collisions, and other courts have adopted the admiralty doctrine."

In support of the statement the following cases were cited:

The Amalia, 34 L. J. Adm. 21;
The Dundee, 2 Hagg. Adm. 137;
The Mary J. Vaughan, 2 Ben. 47;
Parrott v. *Knickerbocker Ice Co.*, 46 N. Y. 361;
Mailler v. *Express Propeller Line*, 61 N. Y. 312.

Among other American cases commenting on the point, *The J. G. Gilchrist*, 173 Fed. 666, may also be noticed. In that case the court said (p. 672):

> "Collision cases are now called to my attention by which it is clearly shown that, not only is demurrage a proper element of damages, but that interest should be allowed from the date of collision, unless in the discretion of the court there are special reasons for its disal-

> lowance. The reason for the rule is that the party damaged is entitled to a complete return for the loss sustained by reason of the tort, and the interest is regarded as a part of the indemnification or damage award."

This decision was affirmed by the Circuit Court of Appeals for the Second Circuit (183 Fed. 105) and was cited approvingly by the Circuit Court of Appeals for the First Circuit in *Eastern S. S. Corp.* v. *Great Lakes Dredge & Dock Co.*, 256 Fed. 497, 505. See also *The Mary J. Vaughan*, 16 Fed. Cas. 9217, affirmed by this court in *The Vaughan and the Telegraph*, 14 Wall. 258; *The Connors*, 1927, A. M. C. 1713 (C. C. A. 2d); *The Ressaprage*, 1925 A. M. C. 1537 (S. D. Ga.) *The James A. Hoyt*, 1927 A. M. C., 779, 18 Fed. (2d) 291 (E. D. Mich.); and cases cited pp. 6-13 of petitioner's principal brief.

There is not a shadow of doubt as to this difference in the theory of recovery in admiralty and at law; and in admiralty, interest is universally regarded as an essential element of the "full and complete indemnity" to which the collision libellant is entitled. Without interest as the conventionally measured use-value of his ship during the period between collision and final decree, the collision libellant could not be restored, as the rule of *restitutio in integrum* requires, to the pecuniary position he would have been in, had the collision not occurred.

With interest allowed for such an object and under such a theory, the "common-law rule" mentioned in the *North American* case obviously could have nothing to do, even if the centuries of admiralty's separate history could be ignored to allow of importing this rule of the law courts into a maritime case. If this seem doubtful, it is necessary but to point to law cases in which the theory of recovery has been the same as that held in courts of admiralty.

Thus, as noted in *Frazer* v. *Bigelow Carpet Company*, cited *supra*, interest is allowed in collision cases even in courts of law. In *Parrott* v. *Knickerbocker Ice Company*, 46 N. Y. 361, the court said (p. 369):

"The only remaining questions raised related to damages. By stipulation of the parties, but two items were left to be passed upon by the referee, viz., the value of the sloop, and interest. There was sufficient evidence to sustain his finding, as to the value of the vessel, and we think that interest on the value of the property lost was properly allowed. In cases of trover, replevin and trespass, *interest on the value of property unlawfully taken or converted, is allowed by way of damages, for the purpose of complete indemnity of the party injured, and it is difficult to see why, on the same principle, interest on the value of property lost or destroyed, by the wrongful or negligent act of another, may not be included in the damages.* (*Propeller Mary Vaughan* v. *Steamboat Telegraph*, 2 Benedict, 47; Sedgwick on Damages, p. 385, and cases cited; *Walrath* v. *Redfield*, 18 N. Y. 457.)" (Italics ours.)

The same result has been reached by this court itself under the identical theory of a full and complete indemnity in the condemnation cases. In *Seaboard Airline Railway Company* v. *United States*, 261 U. S. 299, this court said (p. 304):

"The compensation to which the owner is entitled is the full and perfect equivalent of the property taken. *Monongahela Navigation Company* v. *United States*, 148 U. S. 312, 327. It rests on equitable principles and it means substantially that the owner shall be put in as good a position pecuniarily as he would have been if his property had not been taken. *United States* v. *Rogers* (C. C. A., Eighth Circuit), 257 Fed. 397, 400. He is entitled to the damages inflicted by the taking. *Northern Pacific Ry. Co.* v. *North American Telegraph Co.* (C. C. A., Eighth Circuit), 230 Fed. 347, 352, and cases there cited.

"• • •

"• • • Where the United States condemns and takes possession of land before ascertaining or paying compensation, the owner is not limited to the value of the property at the time of the taking; he is entitled to such addition as will produce the full equivalent of that value paid contemporaneously with the taking. Interest at a proper rate is a good measure by which to ascertain the amount so to be added. • • •

> "The addition of interest allowed by the District Court is necessary in order that the owner shall not suffer loss and shall have 'just compensation' to which he is entitled."

The court therefore held (p. 306) that the omission from the Lever Act (40 Stat. 276, 279) of any specific command to include interest was inoperative to preclude its allowance and interest was accordingly decreed. The following cases are in accord:

Brooks-Scanlon Corporation v. *United States*, 265 U. S. 106, 123;
Liggett & Myers Tobacco Company v. *United States*, 274 U. S. 215, 220;
Phelps v. *United States*, 274 U. S. 341, 344.

It is obvious that the words in which this court described the requirements of "just compensation" in the *Airline* case are almost the exact words in which, it has been seen, *supra*, the admiralty courts describe the requirements of *restitutio in integrum*. If the rule, that "delay or default in payment will not be attributed to the sovereign", is inoperative to prevent the allowance of interest in the condemnation cases, it clearly should be here also, since the object and the theory of allowance is in the two cases precisely the same. And finally there is the stubborn fact that interest was allowed in *The Nuestra Senora de Regla*, and in *The Paquete Habana*, and in *The Thekla*. It seems plain, then, that, on principle and authority alike, "damages" as against the Government in maritime collision cases must, and does, include interest.

The contention made by counsel for the Government that there is a distinction between interest and other items of "damages" in a collision case is unsound. The contention of the Government's counsel is apparently that because the court has a discretion to allow or disallow interest, this shows *ipso facto*, that interest is not properly included within the word "damages". This overlooks the fact that in a maritime col-

in the sum of $17,215.17, and to the libellants as owners of the "Golden Rule" and for the claim on account of certain personal effects of the crew, in the sum of $9,205.45. It was further decreed that the owners of the "Chattahoochee" might recoup from the owners of the "Golden Rule" one-half of the sum of $17,215.17, or $8,607.58, this being the damages which were paid to the owners of the cargo. From this decree the owners of the "Golden Rule" took an appeal. As they were unsuccessful in the appeal to this court, no interest was allowed on the balance of the award due the "Golden Rule".

There are only sixteen cases in which there has been a partial disallowance of interest. We have grouped these sixteen cases below, from which it appears that eight of them are cases in which damages were assessed on the basis of a lump sum, and therefore may be disregarded:

Damages assessed on a lump sum basis:

Waring v. *Clarke*, 5 How. 441;
The Propeller Monticello, 17 How. 152;
Whitridge v. *Dill*, 23 How. 448;
The Louisiana, 3 Wall. 164;
The Washington and Gregory, 9 Wall. 513;
The Lucille, 15 Wall. 676;
The Commerce, 16 Wall. 33;
The Albert Dumois, 177 U. S. 240.

Interest allowed in part and on decree:

St. John v. *Paine*, 10 How. 557;
McCready v. *Goldsmith*, 18 How. 89;
Altee v. *Packet Company*, 21 Wall. 389;
The New York, 175 U. S. 187.

There is no discussion of the question of interest in these cases, but in the case of *The New York*, 175 U. S. 187, damages were reduced by this court.

Interest disallowed prior to decree:

Newton v. *Stebbins*, 10 How. 586;
The Potomac, 105 U. S. 630;
The Scotland, 118 U. S. 507;
The Des Moines, 154 U. S. 584.

In *Newton* v. *Stebbins*, 10 Howard, 586, the libellant was awarded, by the commissioner appointed to assess damages, $3,328.25. On exceptions, this award was reduced to $2,403.70. Apparently interest was disallowed because of the excessive demand for damages made by the libellant, although there is no discussion of the subject in the books.

In *The Potomac*, 105 U. S. 630, there had been delay in entering decree.

In *The Scotland*, 118 U. S. 507, this court considered that the circuit court of appeals might have had good reason for exercising its discretion in not allowing interest on the value of the strippings, which the respondent apparently had sought leave to surrender to the court. The court also disallowed interest on costs because of the delay in entering decree.

In *The Des Moines*, 154 U. S. 584, the district court held both vessels to blame. The judgment of the district court was affirmed on appeal by the circuit court of appeals. The owners of the "Des Moines" alone appealed from the decree of the circuit court to this court.

Interest in Collision Cases in the United States Reports.

Cases in which it appears from the reports or the records filed in the clerk's office of this court that interest has been allowed in full.

Title of Case.	*Reported.*
The Genesee Chief,	12 How. 443.
Fretz v. Bull,	12 How. 466.
The New York v. Rae,	18 How. 223.

Title of Case.	*Reported.*
Culbertson v. Shaw,	18 How. 584.
Ure v. Coffman,	19 How. 56.
Rogers v. The St. Charles,	19 How. 108.
N. Y. & V. S. S. Co. v. Calderwood,	19 How. 241.
Snow v. Hill,	20 How. 543.
The Louisiana,	21 How 1.
Union S. S. Co. v. N. Y. & Va. S. S. Co.,	24 How. 307.
The New Philadelphia,	1 Black 62.
The Propeller Commerce,	1 Black 574.
The Commander-in-Chief,	1 Wall. 43.
Sturgis v. Clough,	1 Wall. 269.
The Ann Caroline,	2 Wall. 538.
The Ottawa,	3 Wall. 268.
The Granite State,	33 Wall. 310.
Bentley v. Coyne,	4 Wall. 509.
The Hypodame,	6 Wall. 216.
The Vanderbilt,	6 Wall. 225.
The China,	7 Wall. 53.
The Carroll,	8 Wall. 302.
The Baltimore,	8 Wall. 377.
The Potomac,	8 Wall. 590.
The Johnson,	9 Wall. 146.
The Fairbanks,	9 Wall, 420.
The Alleghany,	9 Wall. 522.
The City of Paris,	9 Wall. 634.
The Syracuse,	9 Wall. 672.
The Columbia,	10 Wall. 246.
The Fannie,	11 Wall. 238.
The Spray,	12 Wall. 366.
Norwich Co. v. Wright,	13 Wall. 104.
The Bridgeport,	14 Wall. 116.
The Mabey & Cooper,	14 Wall. 204.
The Vaughan,	14 Wall. 258.
The Telegraph,	
The Cayuga,	14 Wall. 270.
The Webb,	14 Wall. 406.

Title of Case.	*Reported.*
Merrill v. Petty,	16 Wall. 338.
The Favorita,	18 Wall. 598.
The Wenona,	19 Wall. 41.
The Pennsylvania,	19 Wall. 125.
The Clarita & Clara,	23 Wall. 1.
The Seal Gull,	23 Wall. 165.
The Teutonia,	23 Wall. 77.
The Free State,	91 U. S. 200.
The Dove,	91 U. S. 381.
The City of Washington,	92 U. S. 31.
The American,	92 U. S. 432.
The Galatea,	92 U. S. 439.
The Alabama & The Game-Cock,	92 N. S. 695.
The Atlas,	93 U. S. 302.
The Stephen Morgan,	94 U. S. 599.
The Colorado,	91 U. S. 692.
The Wanata,	95 U. S. 600.
The Virginia Ehrmann,	97 U. S. 309.
The City of Hartford,	97 U. S. 323.
The Benefactor,	102 U. S. 214.
The Civilita,	103 U. S. 699.
The Connecticut,	103 U. S. 710.
The Anna Lindsley,	104 U. S. 185.
The Scotland,	105 U. S. 24.
The S. C. Tyron,	105 U. S. 267.
The New Orleans,	106 U. S. 13.
The North Star,	106 U. S. 17.
The Nevada,	106 U. S. 154.
The Sterling & Equator,	106 U. S. 647.
The Belgenland,	114 U. S. 355.
The Charles Morgan,	115 U. S. 69.
The City of Norwich,	118 U. S. 468.
The Great Western,	118 U. S. 520.
The Manitoba,	122 U. S. 97.
The Maggie J. Smith,	123 U. S. 349.
The Nacoochee,	137 U. S. 330.

Title of Case.	*Reported.*
The E. A. Packer,	140 U. S. 360.
The Blue Jacket,	144 U. S. 371.
The City of New York,	147 U. S. 72.
The Britannia,	153 U. S. 130.
The St. John,	154 U. S. 586.
Hutchinson v. The Northfield,	154 U. S. 629.
The Breakwater,	155 U. S. 252.
The Oregon,	158 U. S. 186.
The Delaware,	161 U. S. 459.
The Umbria,	166 U. S. 404.
The Victory & The Plymothian,	168 U. S. 410.
Workman v. New York City,	179 U. S. 552.
The Barnstable,	181 U. S. 464.
Lie v. S. F. & P. S. S. Co.,	243 U. S. 291.
Liv., etc., Nav. Co. v. Br. Term'l,	251 U. S. 48.
The Thekla,	266 U. S. 328.
The Proteus Cushing,	268 U. S. 146.
The Newport Sven,	276 U. S. 454.

Cases which may be disregarded because the question of interest could not have arisen because the libels were dismissed or the appeals were from judgments on jury verdicts.

Title of Case.	*Reported.*
Bussy v. Donaldson,	4 Dall. 206.
Smith v. Condry,	1 How. 28.
Strout v. Foster,	1 How. 89.
Williamson v. Barrett,	13 How. 101.
Walsh v. Rogers,	13 How. 283.
Stainback v. Rae,	14 How. 532.
Peck v. Sanderson,	17 How. 178.
Goslee v. Shute,	18 How. 463.
N. Y. & B. Tr. Co. v. Phil. & S. S. N.	
The Resolute & Northerner,	1 Wall. 682.

Title of Case.	*Reported.*
The Morning Light,	2 Wall. 550.
The Grace Girdler,	7 Wall. 196.
The Nichols,	7 Wall. 656.
The Gray Eagle,	9 Wall. 505.
The Farragut,	10 Wall. 334.
The Scotia,	14 Wall. 170.
The Java,	14 Wall. 189.
The S. B. Wheeler,	20 Wall. 385.
The Dexter,	23 Wall. 69.
Sherlock v. Alling,	93 U. S. 99.
The John L. Hasbrouck,	93 U. S. 405.
Schoonmacher v. Gilmore,	102 U. S. 118.
The Illinois,	103 U. S. 298.
The Adriatic,	107 U. S. 512.
The L. P. Dayton,	120 U. S. 337.
In *re* Morrison,	147 U. S. 14.
The Servia,	149 U. S. 144.
Belden v. Chase,	150 U. S. 674.
The Ludwig Holdberg,	157 U. S. 60.
The Homer Ramsdell Co. v. C. G. T.,	182 U. S. 406.
U. S. v. St. Louis Transp. Co.,	184 U. S. 247.
Davidson S. S. Co. v. U. S.,	205 U. S. 187.
Cornell Steamb. Co. v. Phoenix Constr. Co.,	233 U. S. 593.
The Western Maid,	257 U. S. 419.
Littlejohn v. U. S.,	270 U. S. 205, 215.

Cases concerning which we have been unable to obtain any information on this subject either from the reports or the records on file in the clerk's office of this court.

Title of Case.	*Reported.*
The Schr. Catharine,	17 How. 170.
The Oregon,	18 How. 570.
Crockett v. Newton,	18 How. 581.

Title of Case.	*Reported.*
Cushing v. The John Fraser,	21 How. 184.
N. Y. & L. S. S. Co. v. Rumball,	21 How. 372.
Chamberlain v. Ward,	21 How. 548, 572.
Nelson v. Leland,	22 How. 48.
Hanly v. Balt. S. P. Co.,	23 How. 287.
Pearce v. Page,	24 How. 228.
Newell v. Norton & Ship,	3 Wall. 257.
Woodworth v. Ins. Co.,	5 Wall. 87.
The Siren,	7 Wall. 152.
The Corsica,	9 Wall. 630.
The Suffolk County,	9 Wall. 651.
The Sapphire,	11 Wall. 164.
The Maria Martin,	12 Wall. 31.
Thorp v. Hammond,	12 Wall. 408.
The Ariadne,	13 Wall. 475.
The Merrimac,	14 Wall. 199.
The Continental,	14 Wall. 345.
The Mary Eveline,	16 Wall. 348.
The Falcon,	19 Wall. 75.
The Lady Pike,	21 Wall. 1.
The Great Republic,	23 Wall. 20.
The Sunnyside,	91 U. S. 208.
The Juniata,	93 U. S. 337.
The Abbotsford,	98 U. S. 440.
The Clara,	102 U. S. 200.
The Richmond,	103 U. S. 540.
The Martello,	153 U. S. 64.
The Eugene F. Moran,	212 U. S. 446.
White Oak Co. v. Boston Canal Co.,	258 U. S. 341.

lision case, the only mode in which interest can be given is as damages. As Mr. Justice Story said in *The Santa Maria*, 10 Wheat. 431, at page 445:

> "• • • in cases of tort, if given at all, interest partakes of the very nature of damages."

This discretion is not arbitrary and as the analysis (in the appendix to this brief) of all of the maritime collision cases that have been before this court shows, interest is always allowed in the absence of some conduct on the part of the libellant which would make it inequitable to do so, as for instance, laches or vexatious appeals.

From our examination of the reports of maritime collision cases which have been before this court, we find there have been 176 such cases. Of these cases 34 may be disregarded because the question of interest could not have arisen in them because the libels were dismissed or they were appeals from judgment entered on a jury verdict. Of the remaining cases, it appears from either the reports or the records filed in the clerk's office of this court, that in 92 of them interest was allowed fully. In 18 of them interest was not allowed in full. We have discussed these 18 cases at length in the appendix, and it appears from that discussion that there was good cause for disallowance of interest in each of these cases either in whole or in part as the case might be. There remain 32 cases, in which from neither the reported opinions nor from the records on appeal can counsel obtain any information on this subject.

Neither here nor abroad has this discretion prevented the admiralty courts from insisting on the necessity of interest as an element of the collision plaintiff's remedial right—his right to *restitutio in integrum*. The existence of this element of discretion did not prevent the award of interest against the Government in *The Nuestra Senora de Regla*, or in *The Paquete Habana*, or in the *The Thekla*.

It seems to the petitioner that the foregoing considerations demonstrate clearly that an enabling act which provides for

the assessment of "damages" against the Government in a maritime collision case must be held to constitute under the doctrine of the *Angarica* case, *supra*, a sufficient generic consent to the award of interest against the Government; but if it be insisted that something more is needed—something more specific—some reference to a body of law, as in the cases cited in the *North American* case (p. 335), or, as in *United States* v. *McKee*, 91 U. S. 442, some reference to a mode of settlement, from which it can be inferred that interest was intended to be allowed, then still there can be no doubt that interest in the present case should be awarded. For the statute says that the "damages" shall be assessed upon admiralty principles and it says that these principles shall be the same as apply in like cases between private persons. How—short of naming specifically every element of the damages to be awarded, including interest—the intention of Congress could be any more clearly expressed the petitioner does not see.

The Government has contended that the enabling act upon which the present libel is based constitutes but a limited submission to the jurisdiction of the court and, consequently, that *The Nuestra Senora de Regla*, *The Paquete Habana*, and *The Thekla* are all totally irrelevant to the present case, since in them the Government was generally before the court. But where in the statute is the limitation? The only limitation that petitioner can discern is the provision that the determination of the controversy shall be in admiralty but that same limitation obviously also existed in *The Nuestra Senora de Regla*, *The Paquete Habana*, and *The Thekla*. For the rest, the words of the statute are almost the identical words in which this court described the general submission in the above three cases.

In *The Nuestra Senora de Regla*, where it was held that the United States had submitted itself to the jurisdiction of the prize court so that damages might be awarded against it, this court said (p. 102):

> "Under these circumstances we cannot but think the United States have voluntarily submitted themselves to the court at the instance of the Spanish Government, and with the consent of the claimant, *for the purpose of having the questions of damages growing out of the capture judicially settled according to the rules applicable to private persons in like cases.*" (Italics ours.)

In *The Paquete Habana*, 175 U. S. 677 (on a second appeal 189 U. S. 453) this court reaffirmed this ruling:

> "In *The Nuestra Senora de Regla*, 108 U. S. 92, 102, the court was of the opinion that *the United States had submitted to the jurisdiction of the court so far as to warrant the ascertainment of damages according to the rules applicable to private persons in like cases.* It seems to us that the facts here are not less strong." (Italics ours.)

In the private act in the present case the purpose and extent of the submission is stated in substantially the same language as that previously used by this court. Indeed, it seems probable that the words of the act herein were derived from the opinions in these cases. The words of the special act are:

> "• • •the said court shall have *jurisdiction* to hear and determine the whole controversy and *to enter a judgment or decree for the amount of the legal damages sustained by reason of said collision*, if any shall be found to be due for or against the United States, *upon the same principle and measure of liability* with costs *as in like cases in admiralty between private parties* with the same rights of appeal; • • •" (Italics ours.)

The italicized words of the act are in effect a *verbatim* copy of the words of this court just quoted from *The Nuestra Senora de Regla* and *The Paquete Habana*. In both cases interest was awarded against the Government. Surely Congress cannot use substantially this court's exact words and yet intend that those words shall be given a meaning wholly at variance from that which they have hitherto been accorded by this court.

In *The Thekla* this court held that

> "When the United States comes into Court to assert a claim it so far takes the position of a private suitor as to agree by implication that justice may be done with regard to the subject matter."

This, although the executive officers who had filed the claim in *The Thekla* had positively disclaimed all governmental liability. By the act in suit the court is to "have jurisdiction to hear and determine the whole controversy" and to enter a judgment, or decree, for "damages" whether "found to be due *for* or against the United States". Is not the United States, under this act, "assert[ing] a claim" just as it did in *The Thekla?* Has it not expressly agreed to that to which it was held it had "agree[d] by implication" in *The Thekla*—*i.e.*, "that justice may be done with regard to the subject matter"? Should the result, then, not be the same as in *The Thekla?* Or is legislative consent less effective to create private rights than is executive disclaimer?

We can see no answer to the argument that this court has held already that to adjudicate a claim against the Government "according to the rules applicable to private persons in like cases" means that interest runs against the Government if it would run in a like case against a defeated private party. Congress, in using the words "upon the same principle and measure of liability with costs as in like cases in admiralty between private parties", must have intended the same result.

The court must be struck by the fact that the reliance of the Government is upon district court cases that have not been reported and upon declarations of Congress in acts other than that in suit. Petitioner, on the other hand, builds its case upon the single act of Congress that is relevant to this case and upon the reported decisions of the higher courts, including this court itself. The Government's case is, to say the least, somewhat anomalous.

The other acts of Congress which the Government seeks to import into this case, though perhaps insidiously productive

of doubt, are in fact wholly irrelevant; for they are obviously not *in pari materia* with the act in suit and what Congress has done in one of its acts is really no guide to its intention in another.

As to the possible unreported cases in the district courts involving other private acts, it is beyond dispute that such cases could never alter the law as expounded here. Yet the Government has called ill-considered the decisions in the Second Circuit upon the question here at issue, because, as it contends, those decisions are at variance with these unreported cases in certain district courts. The fact is that the courts of the Second Circuit have been fully aware of the general rule that interest is not to be awarded against the Government without its consent. In the principal one of these Second Circuit decisions—that of the Circuit Court of Appeals in *Texas Company* v. *United States*, 16 Fed. (2d) 945—the court said (p. 947):

> "The United States is not liable to pay interest in the absence of a statutory provision to that effect, except where it has contracted to pay it, or where the United States submits itself to the jurisdiction of the court, or if sued, places itself in the position of a private party."

But the court also recognized that

> "Interest may be provided for by the name of legal damages."

and that

> "In a suit between private parties in admiralty growing out of a collision, it has long been settled that interest is awarded as part of the measure of damages. The object of the award of damages is to place the injured party in the same pecuniary position as he would have been in but for the collision. This principle has been referred to in admiralty as that of the right to a full and complete indemnity."

And observing that

> "By the authority of the statute, the appellee may maintain its libel, as it would between private parties."

it held that

> "The phrase 'the legal damages • • • found to be due • • • upon the principles and measure of liability, as in like cases in admiralty between private parties', when given the interpretation intended by Congress in this enactment, includes an award of interest, as is allowed in the case of a litigation between private parties in admiralty. • • • We must give to the language employed its ordinary and accepted meaning. We must presume that Congress intended that the principle of *restitutio in integrum* should be applied, as it is in cases in admiralty of like nature between private parties. • • • Indemnity is not complete without interest. The admiralty courts in suits against private persons have always followed this rule. We think Congress intended that it should be followed in this instance. It was error to refuse interest in the court below."

It must be clear to this court that the Circuit Court of Appeals for the Second Circuit was influenced to its decision by the requirements of the admiralty principle of *restitutio in integrum*. The contrary decisions in the First Circuit have simply disregarded that doctrine.

It is a doctrine, as Roscoe says (*op. cit supra*, p. 6), that is

> "• • • no mere sonorous phrasing but the expression of an intention to assess damages on well-defined legal principles."

It has been used by the courts, he says

> "• • • because it conveyed in a convenient and terse form the idea of the Court of Admiralty that damages should, if possible, place the innocent party in the same pecuniary position as if no injury had been done to him."

It symbolizes all the multifarious facts of admiralty's separate history, its broader and more flexible powers, its more equitable notions—for admiralty is equity: it "administers justice *ex aequo et bono*" (Story, J. in *Plummer* v. *Webb*, 4 Mason, 380)—and, in a case like the present, the principle of *restitutio in integrum* concretely means that an

admiralty court can do justice when perhaps a court of law could not.

For what the petitioner here seeks is no more than simple justice requires and therefore no more than Congress in an act specifically entitled "for the relief of the owner of the steam light Cornelia" might in reason be expected to give. As this court has said in *The Thekla*,

> "The absence of legal liability [on the part of the Government] in a case where but for its sovereignty it would be liable does not destroy the justice of the claim against it."

Sovereign immunity is deeply embedded in our decisional law; but where, as in the present case, the technical and logical grounds that support it are lacking, "the reasons", as this court itself has remarked in *The Thekla*, "are strong for not obstructing the application of natural justice against the Government by technical formulas when justice can be done without endangering any public interest."

The petitioner therefore renews its suit that the decree herein of the Circuit Court of Appeals for the First Circuit be amended to allow interest at the legal rate applied in the District of Massachusetts, with costs to the petitioner.

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APPENDIX.

Analysis of Maritime Collision Cases Which Have Been Before the Supreme Court of the United States Respecting the Allowance of Interest.

177 Cases.

In 92 of these cases interest was allowed in full from date of collision or demand for payment. In 2 cases, interest was disallowed and in 16 interest was allowed only in part. In 35 cases the question of interest could not have arisen because the libels were dismissed or they were appeals from judgments on jury verdicts. We could obtain no information whatever with respect to whether interest was allowed or disallowed in 32 cases. We have set forth in detail the results of our search.

Of all of the cases that have been in this court, there are only two in which there has been a total disallowance of interest. These cases are *The Elizabeth Jones*, 112 U. S. 514, and *The Chattahoochee*, 173 U. S. 540. From an examination of *The Elizabeth Jones*, it appears that there was much doubt as to whether or not the "Willis" was also at fault. Although a decree was awarded against the "Jones," holding her solely to blame, this court at the end of its opinion, stated:

> "On the whole case, we are of opinion that the decree of the Circuit Court must be affirmed, but without interest on the amount of that decree."

In *The Chattahoochee*, libel had been filed by the owners of the schooner called the "Golden Rule", which was sunk as a result of a collision with the steamer "Chattahoochee". The libellants, the owners of the "Golden Rule", filed their libel not only on their own behalf, as owners of the schooner, but as bailees of the owner of the cargo on the schooner. Damages were awarded to the libellants as bailees of cargo,